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In The

Supreme Court of the United States

October Term, 1974

No. 74-1109

THE PROCTER AND GAMBLE COMPANY, and FMC CORPORATION,

Petitioners,

vs.

THE CITY OF CHICAGO,

Respondent.

BRIEF IN OPPOSITION OF RESPONDENT CITY OF CHICAGO

Respondent City of Chicago, a municipal corporation, respectfully urges the Court to deny issuance herein of a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition for certiorari.

QUESTIONS PRESENTED

1. Whether the Chicago ordinance, banning the sale of detergents containing phosphorus as harmful to the environment, is a reasonable exercise of the City's police power within the legislative discretion of the City Council.

2. Whether federal environmental control has preempted the field of environmental control, to the exclusion of supplementary State and local environmental regulation.

3. Whether the Chicago ordinance unduly burdens interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States.

4. Whether the petitioners have proven they were damaged.

REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals is based upon well established constitutional principles which have been reiterated by this Court time and time again over many decades. It presents no novelties or uncertainties that require the intervention of this Court.

Petitioners' conception of the "free circulation" of commodities in a national economy exempt from State and local governmental exercises of the police power, which the petition for certiorari (p. 10) describes as mere "local impediments," is profoundly erroneous. If petitioners' theory of the commerce clause were law, which it is not and never has been, it would compel a universal federal preemption of all regulation of every phase of interstate commerce.

The field of environmental control, in particular, has not been preempted by the federal government. On the contrary, the federal environmental control statutes expressly recognize the right of State and local governments to enact supplementary State and local environmental control legislation. The petition totally ignores this, although the opinion of the Court of Appeals specifically mentioned it (Petition, A. 16). Petitioner's conception of the Commerce Clause would nullify this direction of the Congress.

The petition describes as true, not merely what is in controversy, but what was admitted as untrue by petitioner Procter and Gamble Company at the public hearing before the Environmental Control Committee of the City Council at the time the ordinance was enacted. The petition (p. 10) describes phosphate detergents as "safe and beneficial

products," whereas petitioner there admitted (A. 2138, 2147) that phosphates in detergents are "guilty" of having a deleterious effect on the environment, to find a safe and effective substitute for which the company was spending millions of dollars on research.

Nor does the petition describe the opinion of the Court of Appeals accurately. It did not limit the Commerce Clause to interstate transportation. And although the opinion modestly described the constitutional questions presented as difficult, it experienced no hesitancy or uncertainty in coping with them.

I.

ENVIRONMENTAL CONTROL HAS NOT BEEN PREEMPTED BY THE FEDERAL GOVERNMENT.

IN THE ABSENCE OF PREEMPTION, THE COMMERCE CLAUSE DOES NOT PROHIBIT LOCAL LEGISLATION, ENACTED PURSUANT TO A MUNICIPALITY'S POLICE POWER, DESIGNED TO PROTECT AND IMPROVE THE ENVIRONMENT, EVEN THOUGH IT AFFECTS INTERSTATE COMMERCE.

There is nothing in federal law which precludes involvement of local governments in environmental control. On the contrary, Section 1370 of the Federal Water Pollution Prevention and Control statute (33 U.S.C. §1370), as the Court of Appeals noted (A. 16), declares:

> "Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollution, or (B) any requirement respecting control or abatement of pollution; . . . ."

The federal Clean Air Act contain similar provisions recognizing the power of State and local governments to enact and enforce measures for the prevention and control of air pollution (42 U.S.C. §1857d-1).

It is well established that, in the absence of preempting federal legislation, the commerce clause does not prohibit state or local legislation, enacted pursuant to the police power of the State or municipality, for the evident purpose of protecting the health, safety or welfare of the community, even though such legislation may have some effect on interstate commerce. *Willson* v. *Black Bird Creek Marsh Co.*, 2 Pet. 245, 7 L. ed. 412 (1829); *License Cases*, 5 How. 504, 12 L. ed. 256 (1847); *South Carolina Highway Dept.* v. *Barnwell Bros.*, 303 U.S. 177 (1939); *Milk Board* v. *Eisenberg*, 306 U.S. 346 (1939); *California* v. *Thompson*, 313 U.S. 109 (1941); *H.P. Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949); *Huron Portland Cement Co.* v. *City of Detroit*, 362 U.S. 440 (1960); *Brotherhood of Locomotive Firemen* v. *Chicago, R.I. & P.R. Co.*, 393 U.S. 129 (1968).

The Chicago ordinance does not discriminate against out-of-state producers or distributors or in favor of their local competitors. Indeed, before the effective date of the Chicago ban on phosphates in detergents, petitioner Procter and Gamble Company manufactured practically all the detergents it needed for the Chicago warehouse marketing area at its plant within the city limits of Chicago. The gist of its complaint is that, as a result of the ban, it had to ship detergents into the city which it had produced in several other of its plants outside the State.

While this Court has consistently rebuffed attempts of States to advance their own commercial interests by curtailing interstate movement of articles of commerce, the

Court has also consistently supported the rights of the States and their local governmental units to impose, in the interest of local health, safety and welfare, even burdensome regulations against dangers emanating from interstate commerce. *H.P. Hood & Sons* v. *DuMond,* 336 U.S. 525, at 533, 535 (1949).

This principle was held applicable to a municipal anti-pollution ordinance in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U.S. 440 (1960). It has also been invoked to justify state and local legislation aimed at conserving natural resources. Thus, in *Cities Service Gas Co.* v. *Peerless Oil and Gas Co.,* 340 U.S. 179 (1950), this Court upheld the validity under the Commerce Clause of an Oklahoma statute regulating the production of natural gas as a legitimate measure to prevent waste of the State's natural resources "even though the regulation has some impact on interstate commerce" (at 186). There is no natural resource more important than water. Legislation directed toward protecting the quality of the water of a municipality is aimed at conserving its natural resources.

As Justice Frankfurter declared in *Freeman* v. *Hewit,* 329 U.S. 248, at 253 (1964)—a case cited seven times in the amicus curiae brief of the Soap and Detergent Association (pp. 2, 3, 7, 9, 11, 14, 15):

> "A police regulation of local aspects of interstate commerce is a power often essential to a State in safeguarding vital local interests. At least until Congress chooses to enact a nation-wide rule, the power will not be denied to the State. *Minnesota Rate Cases* (*Simpson* v. *Shepard*), 230 U.S. 352, 402 et seq.; *South Carolina State Highway Dept.* v. *Barnwell Bros.,* 303 U.S. 177; *Union Brokerage Co.* v. *Jensen,* 322 U.S. 202, 209-212."

II.

THE CHICAGO ORDINANCE BANNING PHOSPHATES IN DETERGENTS IS A VALID AND CONSTITUTIONAL EXERCISE OF LEGISLATIVE DISCRETION PURSUANT TO THE POLICE POWER.

The Chicago ordinance banning phosphorus in detergents and the decision of the Seventh Circuit upholding its validity can both be sustained on the authority of *Brotherhood of Locomotive Firemen* v. *Chicago, Rock Island and Pacific R. Co.,* 393 U.S. 129 (1968). It was, in fact, under the precedental aegis of the *Brotherhood* case that petitioner Procter and Gamble and several other detergent manufacturers were in *Soap and Detergent Association et al.* v. *Clark,* 330 F. Supp. 1218 (S.D. Fla., 1971) denied a preliminary injunction against enforcement of a Dade County, Florida, ordinance also banning phosphorus in detergents.

Brotherhood reversed a district court decision invalidating a state "full-crew" railroad law. This Court ruled that, in determining whether such enactments impose a burden on interstate commerce prohibited by the Constitution, the district court was not authorized to resolve conflicts in the evidence as to the necessity of the laws as safety measures. In thus reaffirming its prior decisions upholding "full-crew" legislation by the states—*Chicago, R.I. & Pa. R. Co.* v. *Arkansas,* 219 U.S. 455 (1911), *St. L., L.M. & S.R. Co.* v. *Arkansas,* 240 U.S. 518 (1916), *Missouri Pac. R. Co.* v. *Norwood,* 283 U.S. 249 (1931), 290 U.S. 600 (1973)—this Court declared that safety is a matter of public policy, which under the American system can be fixed only by the legislature. The Court held that it was not open to the district court to place a valve on the additional safety in terms of dollars and cents, in order to

determine whether this valve, as calculated by the trial court, exceeded the financial cost to the railroads. In the absence of Congressional action, the judicial power of the federal courts cannot be invoked to invalidate a state safety statute, expressing the judgment of the people of the state through their elected representatives as to the price that should be paid for safety in the industry.

Similarly, in *South Carolina Highway Department* v. *Barnwell Brothers,* 303 U.S. 177 (1938), in upholding a state statute which prohibited trucks over a certain weight from using the state highways, this Court disallowed the trial court's inquiry into the effect of the weight of vehicles upon road durability and traffic safety. The Court declared (at 182-4) that "fairly debatable questions as to [a statute's] reasonableness, wisdom and propriety are not for the determination of the courts, but for the legislative body."

a. The Legislative Deliberations Were Based On Thorough Documentation And Unbiased Public Hearings.

The long and technical record in this case (A. 1-2787) makes it abundantly clear that the Chicago City Council, in enacting the ordinance, exercised its legislative discretion reasonably, non-arbitrarily and non-capriciously.

i. The Origin of the Ordinance.

In February, 1970, Alderman Michael A. Bilandic, the chairman of the Environmental Control Committee of the City Council, received a communication from the Metropolitan Sanitary District of Greater Chicago, which set forth a resolution adopted by its Board of Trustees (A. 2688, 2689), expressing urgent concern about the phosphate problem. It stated that pollution of Lake Michigan

and "our waterways" was increasing at an alarming rate, that stagnation of these waters was being accelerated by phosphorus causing the growth of algae and other aquatic plant life, which reduce the oxygen level of waters. The resolution estimated that phosphates are a basic ingredient of 90 percent of all detergents, but that non-polluting substitutes for the phosphates can readily be obtained. Detergents with phosphates cause untold problems in water treatment and increase the operating costs of sewage treatment plants. The Sanitary District calculated that a nationwide ban on phosphates in detergents would result in an annual savings of $478,000,000 in operating costs of sewage treatment plants in the United States.

Alderman Bilandic was also impressed with the fact that in the Chicago area, the Metropolitan Sanitary District was spending $20,000,000 of the taxpayers' money each year in a for the most part unsuccessful attempt to remove the phosphorus introduced by detergents. Since he suspected the phosphorus probably did not have to be put into the sewage in the first place, he felt the possibility should be explored as to whether the substance could be dispensed with (A. 1043).

In response to the resolution of the Sanitary District, Mayor Daley ordered a thorough staff study of the problem, including a review of the technical literature, and requested the Environmental Control Committee of the City Council to conduct public hearings.

ii. The Report of the International Joint Committee.

Among the materials considered by the committee were several official reports, published by the United States government and made by the U.S. Council on Environ-

mental Quality, the Reuss committee investigating phosphate detergents for the U.S. House of Representatives and the International Joint Commission of Canada and the United States. These reports summarized the experience and expert opinions of the leading chemists and sanitary engineers in the field. They were based on public hearings in which industry defenders of phosphate detergents participated and presented their case. These official reports, which were also introduced into evidence in this lawsuit and have been reproduced in the Appendix (A. 2326-2664), declare in no uncertain terms that the use of phosphorus in detergents seriously deteriorates the environment and is a formidable pollutant.

The report of the International Joint Commission had been the result of a 1964 request by the respective governments to conduct an intensive inquiry into the increased pollution that had led to the dramatic deterioration of Lake Erie.

The Report of the International Joint Commission found (A. 2356, 2357):

> "Increased population, industrialization, intensified agricultural practices and the use of phosphorus-based detergents since the late 1940s have greatly increased the rate of eutrophication of lakes in many parts of the world, including Lake Erie and Lake Ontario. Dense nuisance growths of algae and aquatic weeds degrade water quality. Cladophora, an attached alga, piles up on the beaches when dissolved by wave action. Blue green algae accumulate on the shore creating unsightly odorous scums."

The meaning of the term "eutrophication" was set forth in the Report in the following terms (A. 2355, 2356):

"Eutrophication is the biological response caused by an increase of nutrients in lakes. The biological productivity depends on the supply of essential nutrients. . .

". . . Eutrophic lakes are rich in plant nutrients and support a heavy growth of aquatic vegetation. As a result, biological production is high; the waters are turbid due to the dense growth of phytoplankton; and the deeper waters during periods of restricted circulation become deficient in oxygen as a result of the decomposition of great quantities of organic material. . . .

". . . The biological response produced by natural eutrophication is extremely slow. On the other hand, the inputs of man-derived nutrients into a lake can produce in a few decades a biological response similar to that which under natural conditions would take tens of thousands of years."

Of the various sources of this artificially accelerated eutrophication of the lakes, the Report found (A. 2393, 2394) that phosphorus is the only one that is both growth-limiting in the lakes and can be controlled effectively by man with present-day technology. It also stated that the major source of phosphorus in the lakes is municipal sewage, that in the United States portion of the lakes basin, 70 percent of the phosphorus in sewage originates from detergents, most of the remainder from human excreta, other significant sources being agricultural runoff and some industrial wastes.

In conclusion, the Commission recommended the "complete replacement of all phosphorus in detergents with environmentally less harmful materials by December 31, 1972" (A. 2443).

iii. U.S. Government Reports on Phosphate Detergents.

The Reuss Report concentrated on the detergent industry's defense of the case against phosphorus in detergents, such as the contentions (a) that phosphorus in detergents had not been proven to be the cause of eutrophication; (b) that, when the level of phosphorus in water reaches a certain point, further additions of phosphorus will not result in increased eutrophication; (c) that there is already so much phosphorus in surface waters that eliminating all phosphorus in detergents would not retard the rate of eutrophication; and (d) that phosphate detergents are necessary to maintain cleanliness and sanitation standards. All these objections to banning phosphates in detergents are considered in detail and rejected by the Reuss Report on the basis of contrary evidence.

The First Annual Report of the U.S. Council on Environmental Quality (A. 2607-2664) also found phosphorus in detergents a major cause of water pollution.

iv. Commissioner of Environmental Control Poston.

The ordinance was enacted with the strong endorsement of Dr. H. Wallace Poston, the Commissioner of Environmental Control of the City of Chicago. He testified both before the City Council committee (A. 1992-2033, 2292-2300) and at the trial herein (A. 1138-1213). A graduate sanitary and civil engineer since 1932, Dr. Poston had spent the whole of his long career on environmental matters. From 1949 to 1970 he had been with various federal agencies, including the U.S. Public Health Service and the Federal Environmental Protection Agency. Since 1956 he had been on the Advisory Board on Water Pollution Control of the International Joint Commission. In 1969

Dr. Poston became the U.S. Co-Chairman of the International Joint Commission.

As a result of this extensive technical experience, Poston formed the opinion that phosphates in detergents are contributing to the degradation of our waters and should be eliminated. He was concerned about the large amounts of phosphorus in the Illinois River, from which downstream communities, such as Peoria, receive a large part of their water supply. Even where phosphorus is not the limiting nutrient, elimination of phosphorus brings nearer the day when the water in the river will be clean and it lessens the distance the phosphorus is felt downstream. Poston testified that 60 percent of the phosphorus that goes into the Illinois Waterway from the Metropolitan Sanitary District comes from detergents.

Dr. Poston was also concerned about the amount of phosphorus in Lake Michigan (A. 1155). He testified, "Phosphates that are emptied into Lake Michigan are hazardous to our water supply" (A. 1158) and "Algae is the worst problem insofar as taste and odor in the water supply is concerned" (A. 1173). The ordinance banning phosphorus in detergents does have an effect on other communities around Lake Michigan (A. 1208), since, as the plaintiffs emphasize, practically all the communities around Chicago, as shown on petitioners' map of the Chicago Marketing or Warehouse Area (reproduced at A. 183), get their detergents from the Chicago grocery warehouses. Furthermore, inland communities in the Chicago Warehouse Area, such as Elgin, discharge their sewage into tributaries of the Illinois River, such as the Fox River and Desplaines River, which have great quantities of nuisance algae.

Dr. Poston concluded his testimony at the trial by declaring that the Chicago ordinance was intended to set the communities around Chicago and even around the nation a practical example of a cleanup of the waterways (A. 1208).

v. The Experience of the City's Expert on Water Purification.

Since the 1940's, James C. Vaughn, the now retired Engineer of Water Purification of the City of Chicago (A. 1953), had been warning of the dangers of the use of phosphorus in detergents (A. 1042, 1043, 1953, 1976). A graduate chemist, he had devoted all of his long career to water purification and he possesses an intimate scientific knowledge of the water quality of Lake Michigan over a period of 37 years (A. 1955). Vaughn also testified both at the City Council hearings (A. 2282-2292) and in a deposition taken in the instant lawsuit (A. 1951-1990).

Phosphorus is a contaminant in Lake Michigan, Vaughn stated (A. 1969). It is such by virtue of the conditions it participates in creating (A. 1970), in that it is a nutrient essential to the growth of algae, which in turn produce some serious water treatment problems (A. 1957). Algae accumulate on the screens of filtration plants (A. 1970, 2776, 2777), making it difficult at times to get enough water through the filtration plant to meet public demand (A. 1972). Periodically this creates taste and odor problems —giving "a plain, nasty fishy odor to the water" (A. 1970) or "a pigsty-tasting odor" (A. 1984). It takes a lot of chlorine and carbon to get this out, creates disposal problems and adds to the cost of water treatment in Chicago (A. 1984, 2776, 2777).

There is considerable sewage flowing into the southern end of Lake Michigan, Vaughn explained (A. 1959, 1960). This does not come from the City of Chicago or the suburbs in Cook County, Illinois, which dispose of their sewage through the facilities of the Metropolitan Sanitary District—except when during heavy rainstorms that system is reversed to flow into Lake Michigan instead of into the Illinois River (A. 1960-1963). But all four of the sewage plants of the North Shore Sanitary District in Lake County, Illinois, discharge their sewage into the lake. The sewage treatment of some of these plants removes no more than 40% of the solids and bacterial load (A. 1959). The Milwaukee sewage plant, serving some 600,000 people, discharges its sewage effluent into the lake; "that includes a good deal of untreated sewage," Vaughn testified (A. 1960). The three sewage plants in Lake County, Indiana, serving Gary, East Chicago and Hammond, with a total population of 560,000, discharge 90% of their sewage into Lake Michigan (A. 1959). The Grand and St. Joe Rivers in Michigan also discharge large quantities of sewage into the lake.

As for the future of Lake Michigan, Vaughn gave it as his opinion that if the input of phosphorus into the lake "stopped entirely . . . we would expect the phosphate content to remain more or less constant" because the phosphates absorbed into the life cycle of the plankton are not lost when a given body of plankton die and rot; they return to another life cycle (A. 1968). In recent years there has been a steady increase in the phosphate content of the lake (A. 1965). In the opinion of limnologists, it will take 200 years for Lake Michigan to recycle itself (A. 1969). And in the opinion of some experts, Vaughn testified (A. 1971), "if the phosphorus content" of Lake Michigan "continues

to increase at the present rate . . . Lake Michigan [can] be expected to have the consistency of pea soup by the year 2000."

In the opinion of the City's expert on water treatment, the best method of controlling the phosphates in Lake Michigan is "Not put them in" (A. 1972).

vi. The Hearings Before the City Council Committee on Environmental Control.

The public hearings before the Committee on Environmental Control of the Chicago City Council were held on August 17 and 18, 1970, at which time witnesses were heard and questioned by members of the committee. There was also a concluding session on September 10, 1970, at which the text of the proposed ordinance was read, final statements were made for and against the proposal, and a motion to recommend that the ordinance do pass was adopted unanimously.

A transcript of the hearings appears at A. 1991-2323.

The witnesses testifying in favor of the proposed ban on phosphorus in detergents included several city officials, the Deputy Commissioner of Pollution Control for Cook County, Illinois, the Acting Superintendent and a Trustee of the Metropolitan Sanitary District, a professor of biology and representatives of several environmental organizations.

Testifying against the proposed ordinance were representatives of the Soap and Detergent Association (A. 2116-2147, 2153-2156), and of several manufacturers of detergents, including petitioner Procter and Gamble Company (A. 2147-2151).

In rebuttal of that testimony, several representatives of manufacturers and distributors of no-phosphate detergents were heard, including Sears, Roebuck and Company (A. 2170-2177, 2180-2243).

The Acting Superintendent of the Metropolitan Sanitary District, Ben Sosewitz, testified at the hearing (A. 2033-2049) and endorsed the proposed ordinance. He explained that conventional secondary sewage treatment does not effectively remove phosphorus. This can be done only by additional treatment with chemicals, resulting in precipitation of the phosphorus by iron, calcium and aluminum compounds (A. 2034, 2035). The additional cost to the Metropolitan Sanitary District of the alum treatment to achieve 80 to 90 percent phosphate removal would be about $20,000,000 per year (A. 2035). This additional treatment also creates solid sludge disposal problems (A. 2035).

Detergent sources probably account for 70 percent of the phosphorus in the wastes coming to the sewage treatment plant (A. 2035, 2036). The phosphorus level in the Sanitary District's influent had increased from 6 mg/1 p. to 10 mg/1 p. since 1960 (A. 2036).

In the history of sewage treatment, Sosewitz explained (A. 2041), it has been found more economical to intercept waste material at the source rather than wait until dilution takes place when all the wastes are mixed (A. 2041).

vii. Testimony of Representatives of the Detergent Industry.

The detergent industry responded in force to the invitation to appear at the hearings.

The spokesman for the Soap and Detergent Association was Charles G. Bueltman, its vice-president and technical director. He is a sanitary engineer who for three years had been chairman of the Joint Government and Industry Task Force on Eutrophication. He declared quite frankly, "We take the position that phosphates, as a nutrient, are involved in eutrophication. We have never denied this" (A. 2138). He stated that "the detergent industry has reaffirmed its commitment to maintain highest priority in seeking phosphate replacements" (A. 2121). He said that Procter and Gamble had spent some $3,000,000 in 1969 on research for a replacement for phosphate in detergents and planned to spend $3,500,000 in 1970 for the same purpose (A. 2147, 2148).

Bueltman insisted that, despite all these efforts, no satisfactory substitute had been found, one both safe and efficient. Nitriloacetate (NTA) has been used to some extent, but it is in short supply. The detergent industry uses 2,000,000,000 lbs. of phosphate a year, and production of NTA amounts to only 100,000,000 lbs. a year. There is also a possibility that NTA presents health hazards. And there can be no return to reliance on soap because the required oils and fats are also in short supply.

At the time phosphate detergents were introduced in 1945, the industry had investigated phosphates from a product toxicity, health hazard point of view and found them safe in that respect. Few people were concerned at that time with environmental impact (A. 2143, 2144). Phosphorus did not emerge as an ecological issue until 1958. Since then, he said, the industry has been working on the phosphate problem for a decade. Bueltman frankly admitted (A. 2149, 2142):

> "There is no agreement within the Association as to what to do with our products . . .
>
> "I hope we have not given the impression that we consider phosphate no problem."

Procter and Gamble's representative at the hearings, William Krumrei, its director of public relations, concurred, saying (A. 2147):

> "We are not taking the position that phosphates aren't guilty and therefore, we are going to sit and wait.
>
> "Our policy, within our company, and I believe this is shared with the other companies, is that *if there is any possibility that phosphates are guilty, and there seems to be no question about that,* that we are going to move as quickly as we can to correct that situation. . . ." (Emphasis supplied.)

Lever Brothers' representative, Dr. Mel Goldberg, its technical services manager, supported the position of the Soap and Detergent Association, but admitted that Lever Brothers of Canada had complied with the Canadian limitation on phosphorus in detergents by the use of NTA and had converted its heavy-duty detergent, All, to a zero-phosphorus formula (A. 2159).

Those industry representatives pleaded for more time to find replacements for phosphates and asked the City Council to defer action. But other industry representatives assured the Council there was no reason for delay, that effective, but environmentally safe no-phosphate detergents were available and on the market. That was the position of Sears, Roebuck and Company, De Soto Chemical Company, Clearwater Products, Best Line Products and Diversey Chemical Company (A. 2170-2176, 2180-2231).

Sears assured the committee at the hearing that within two months it would be selling a no-phosphate detergent that contained no NTA and no harmful ingredients (A. 2170). De Soto said it had three plants in operation manufacturing no-phosphate detergents and was building a fourth. Its representative stated its no-phosphate detergent could be used in heavy duty laundry equipment and was less corrosive than phosphates (A. 2173, 2174). Clearwater's representative testified that it could supply Chicago with 90,000,000 lbs. per year of Chicago's detergent requirements of 200,000,000 lbs. per year, furnishing a phosphorus-free detergent that contained no NTA (A. 2209).

viii. The Morris Photographs of the Illinois River.

While the proposed ordinance was pending before the City Council committee, Commissioner Poston dispatched his Deputy Commissioner of Environmental Control, John G. Morris, on a reconnaissance flight to check on the current state of algae growths in the Illinois River (A. 1243, 1244). A graduate civil and sanitary engineer with at that time 22 years professional experience, Morris had in 1961-62, as Director of Technical Operations of the U.S. Public Health Service in the Great Lakes-Illinois River Project, supervised the compilation of a detailed technical report (Defendant's Exhibits 38, 39) on the entire Illinois River drainage basin for the hearings on diversions from Lake Michigan conducted by Judge Maris, sitting as master-in-chancery for this Court (A. 1222, 1223).

Accompanying Morris on his helicopter survey was a commercial photographer, who, at Morris' direction, took numerous photographs of algae blooms and other evidences of accelerated eutrophication in the Illinois River. These

pictures were available to members of the committee during its deliberations.

29 of these photographs, developed as slides, were introduced in evidence at the trial of this case as Defendant's Exhibits 44, 44A-2 and 44AA-44CC, inclusive. They were projected on a screen in the courtroom and accompanied by Morris' running commentary (A. 1243-1247, 1250-1256). These photographs are reproduced at A. 2713-2742.

The reconnaissance was conducted over the Illinois River from Lockport to just below the Starved Rock Pool (A. 1244). Morris explained that the Illinois River is a navigable waterway that has been developed through the construction of a series of dams on the river, with the result that there is "a complete sequence of pools from the confluence of the Illinois River [with] the Mississippi up and through the Chicago River to locks going into Lake Michigan." Because of these constructions and impoundments along its length, the Illinois River cannot be characterized as a free-flowing stream (A. 1226).

The photographs show heavy growths of filamentous algae, large mats of cladophora and noxious aquatic plants, such as coon tail, which clog filters and water intakes and interfere with recreational use (A. 1253). Parts of the river were of the pea soup color associated with dense blooms of blue green algae (A. 1254).

ix. Enactment of the Ordinance.

On September 10, 1970, on the basis of the record before it, the City Council's Committee on Environmental Control unanimously recommended that the proposed ordinance do pass (A. 2324).

On October 14, 1970, the City Council adopted the ordinance by a unanimous vote. An 8.7% limitation on phosphorus in detergents became effective February 1, 1971. The total ban became effective July 1, 1972.

x. The Effectiveness of the Ordinance.

The Director of Research and Development of the Metropolitan Sanitary District of Greater Chicago, Dr. Cecil Lue-Hing, testified at the trial that, as of January, 1973, the phosphate content of the effluent of the Sanitary District had been reduced 67.6 percent as a result of the ordinance (A. 1425-1431). Thus, the effect of the ordinance, he explained, is to bring the Sanitary District into compliance with the standard proposed by the Illinois Pollution Control Board for phosphorus discharges in man-made waterways. The proposed standard is 1.0 part per million. Since the ordinance went into effect, the phosphorus concentration at the Sanitary District's West-Southwest plant, the largest sewage treatment plant in the world, from August to December, 1972, ranged between 0.7 and 0.4 parts per million.

The efficiency of sewage treatment at the Sanitary District has also been improved as a result of the ordinance. A sewage treatment plant's efficiency is measured in terms of suspended solids and biochemical oxygen demand (BOD). Dr. Lue-Hing produced detailed official Sanitary District statistics on these items, illustrating them with graphs. At the West-Southwest plant, suspended solids had been reduced 154,383 lbs. per day; at the North Side plant, the reduction amounted to 26,420 lbs. per day. The total reduction of BOD was 24,688 tons per year.

III.

THE COURT OF APPEALS WAS CORRECT IN RECOGNIZING THE PRESUMPTION OF VALIDITY ATTACHING TO THE ORDINANCE AS DULY ENACTED LEGISLATION.

Petitioners assail the court of appeals with a quite amazing accusation. They claim (Petition, p. 14) that the Seventh Circuit in recognizing (Petition, A-9, 10) the presumption of constitutionality attaching to duly enacted legislation, has "fashioned a novel 'presumption', unsupported by the decisions of this Court, to determine the constitutionality of the Chicago ordinance."

On the contrary, this Court has repeatedly held that the function of the United States courts in reviewing the constitutionality of a state statute or municipal ordinance is limited. As this Court declared in *James* v. *Strange*, 407 U.S. 128, at 133 (1972):

> "We turn therefore to the Kansas statute, aware that our reviewing function is a limited one. We do not inquire whether this statute is wise or desireable, or 'whether it is based on assumptions scientifically substantiated'. *Roth* v. *United States*, 354 U.S. 476, 501 . . . (1957) . . . Misguided laws may none the less be constitutional. . . Our task, however, is not to weigh this statute's effectiveness, but its constitutionality."

Indeed, it is not decisive whether or not the legislative body actually considered the grounds on which the court sustains the enactment, so long as its constitutionality can be justified by some mode of reasoning. *Flemming* v. *Nestor*, 363 U.S. 603, at 612 (1960).

Even if the wisdom of the policy be regarded as debatable, still the legislature is entitled to its judgment. *West Coast Hotel Co.* v. *Parrish*, 300 U.S. 379, at 397,

398 (1937) (Hughes, C.J.); *N.L.R.B.* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); *United States* v. *Darby*, 312 U.S. 100, at 115 (1944); *Sonzinsky* v. *United States*, 300 U.S. 506 (1937); *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); *Olson* v. *Nebraska*, 313 U.S. 236 (1941); *Day-Brite Lighting, Inc.* v. *Missouri*, 342 U.S. 421 (1952).

Under the system of government created by the Constitution, it is up to the legislatures, not the courts, to decide on the wisdom and utility of legislation. *Ferguson* v. *Skrupa*, 372 U.S. 725, at 729, 730 (1963); *Hebe Company* v. *Shaw*, 248 U.S. 297, at 302 (1919) (Holmes, J.).

This presumption that a legislative enactment is constitutional, as stated in many precedents, can be overcome only by "clear and convincing evidence." As the Court of Appeals for the Sixth Circuit declared in *Tower Realty, Inc.* v. *City of East Detroit*, 196 F. 2d 710, at 718 (1952):

> "With regard to the presumption of constitutionality, the rule applicable to ordinances of a city government is the same as that applied to statutes passed by the legislature. . . A statute or ordinance will be presumed to be constitutional by the courts unless the contrary clearly appears; and in case of doubt, every possible presumption not clearly inconsistent with the language and the subject matter is to be made in favor of the constitutionality of the legislation."

Different standards for the evaluation of evidence required to meet the burden of persuasion have been devised for different types of action. The degree of stringency required may be by "a preponderance of the evidence," or by "clear and convincing evidence," or by proof "beyond a reasonable doubt," depending on the nature of the action. Proof by "clear and convincing evidence" is more exacting

than proof by a mere preponderance of evidence. The higher standard of proof means that the trier of the facts must be convinced that the truth of the contention is not merely more probable than not, but is highly probable or a moral certainty. *McCormick on Evidence* (Cleary ed., 1972), p. 796.

The burden of proof never shifts, but at all times remains on the party with the burden of persuasion to sustain the claim on the merits of the case. 9 *Wigmore on Evidence* (3d ed., 1940) §2489; Ladd and Carlson, *Cases and Materials on Evidence* (1972), p. 1186. The burden of going forward with the evidence is different from and distinguished from the burden of proof. It means no more than the obligation of a party to produce contradicting evidence when evidence has been presented by an opponent. Understanding and maintaining the distinction between "burden of proof" and "burden of going forward with the evidence" is vital to the trial of a case (*Id.*).

It was in the light of the foregoing well established principles that the court of appeals ruled: (Petition, A-9, 10):

> "It was proper, however, for the court to consider the 'factual' question of whether the ordinance has any relationship to the elimination of nuisance algae. The question that we are faced with is how much weight, if any, should be accorded the legislature body's determination that the means are reasonably related to achieving the end. In the present case we think it is at this point that the *Pike* balancing occurs. The district court addressed this issue as if it was an ordinary factual dispute over a technical matter that should be decided without the benefit of a presumption. It is our view, however, that if the burden on interstate commerce is slight, and the area of legislation is one that is properly of local concern, the means chosen

> to accomplish this end should be deemed reasonably effective unless the party attacking the legislation demonstrates the contrary by clear and convincing proof. If it is determined that this presumption should be applied, no further balancing need be undertaken. The end has already been deemed legitimate and the burden on interstate commerce slight. If the legislation is a reasonable means to that end it is constitutional."

The citation (Petition, p. 15) of *Minnesota* v. *Barber*, 136 U.S. 313, (1890), as authority for the proposition that "a presumption that local legislation has been validly enacted can [not] be permitted to control the applicability of the Commerce Clause to that legislation," is inapposite. That case concerned a state statute requiring the preslaughtering inspection of livestock destined for human consumption. The Court determined that the statute, despite its stated purpose, had the *de facto* effect of discriminating against out-of-state packers. In the case at bar there is not the slightest element of any such discriminatory effect in the Chicago ordinance. But it was in the context of the Minnesota statute being a *de facto* embargo against interstate commerce that this Court said (at 319), "The presumption that this statute was enacted in good faith, for the purpose expressed in the title, namely, to protect the health of the people of Minnesota, cannot control the final determination of the question whether it is not repugnant to the Constitution of the United States." Nowhere in the record have the petitioners contended that the Chicago ordinance was not enacted in good faith.

IV.

THE AUTHORITIES CITED BY PETITIONERS ARE NOT APPLICABLE. EVEN IF THEY WERE APPLICABLE, THEY WOULD NOT SUPPORT PETITIONERS' CLAIM.

The Seventh Circuit did not base the decision in the instant matter entirely on the doctrine of the *Brotherhood* case, as it would have been justified in doing. It also followed the line of cases cited by petitioners that appear to require that the court, in order to determine the ultimate question of constitutionality, balance the burden on interstate commerce against the local benefit resulting from the enactment—that is, *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945), *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1940).

Southern Pacific and *Bibb* involved state regulation of interstate commerce, in matters (train length and mudguards on trucks) in which interstate uniformity is the compelling interest. See *Soap and Detergent Association* v. *Offutt*, 3 ERC 1117, 1119 (S.D., Ind. 1971), which held these authorities inapplicable to environmental legislation regulating the composition of detergents. *Pike* had in it an element of discrimination against out-of-state enterprises and concerned a statute aimed at promoting the good reputation of local cantaloupe growers, a non-police power state interest adjudged of minimal importance by this Court. But even though that line of cases is not, strictly speaking, applicable here, the court of appeals, in an excess of caution, took it into its comprehensive consideration in deciding this case (Petition, pp. A-7-A-9).

The principal non-transportation case upon which the petitioners rely (Petition, pp. 15, 16) is *Pike* v. *Bruce*

Church, Inc., 397 U.S. 137 (1970). They maintain that this "established" the requirement that applications of the Commerce Clause entail a resolution of questions of "degree". But in *Pike* this Court clearly stated (at 143, 146):

> "We are not, then, dealing here with 'state legislation in the field of safety where the propriety of local regulation has long been recognized' or with an Act designed to protect consumers in Arizona from contaminated or unfit goods. Its purpose and design are simply to protect and enhance the reputation of growers within the State.
>
> ". . . [H]ere the State's interest is minimal at best."

It will be recalled that *Pike* concerned an Arizona statute which prohibited the shipment of cantaloupes out of Arizona unless they were packed in containers in a manner approved by the state. Evidently cantaloupes could be so packed in large numbers only in packing sheds. Plaintiffs' packing shed was located in California, 31 miles away. To build such a packing shed in Arizona would have entailed an expenditure by the plaintiff of $200,000 and meanwhile its perishable $700,000 cantaloupe crop in Arizona would have been lost. Thus, in *Pike*, there was also a strong element of discrimination against an out-of-state enterprise. It was in that context that this Court said in *Pike* (at 142):

> "Although the criteria for determining the validity of state statutes affecting interstate commerce has been variously stated, the general rule that emerges can be phrased as follows: where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Portland Cement*

> *Co.* v. *Detroit,* 362 U.S. 440, 443. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities. Occasionally the Court has candidly undertaken a balancing approach in resolving these issues, *Southern Pacific Co.* v. *Arizona,* 325 U.S. 761, but more frequently it has spoken in terms of 'direct' and 'indirect' effects and burdens."

By its own terms *Pike* is inapplicable to state enactments in the field of safety or legislation designed to protect consumers from unfit goods—that is, police power measures. Legislation that protects the waters of the whole community is a safety measure. Legislation that protects consumers from consuming goods unfit to be consumed because of their deleterious effect on the environment is not, we submit, subject to a balancing test. Such legislation must be upheld if it is a reasonable exercise of legislative discretion.

However, the court of appeals did apply the *Pike* balancing procedure to the Chicago ordinance in minute detail (Petition, pp. A9-20). It came to the conclusion that the burden on interstate commerce was slight compared to the important and proper local objective (p. A-17) and the ordinance "sufficiently effective to be declared constitutional" (p. A-20).

The petitioners have failed to address themselves to a criticism of the court of appeals' detailed application of the balancing test. Instead, the petitioners content themselves with an indulgence in inaccurate generalities.

Petitioners (p. 15) attempt to buttress their position with the authority of Professor Paul Freund. But it is

the court of appeals in its opinion, and not the petitioners, that has applied Freund's analysis of this Court's method of interpreting the Commerce Clause. See Freund, The Supreme Court of the United States (Meridian ed. 1961), p. 21), where he comments:

> "The Court has long since abandoned the merely verbal criteria and has sought, on a highly particularistic basis, to weigh the local benefit and need against the burden on commerce with other states. In the silence of Congress a state may enforce a full-crew law against an interstate railroad; but it may not apply a maximum-train-length statute to such a carrier. The difference can be found only in an estimate, based on a detailed record, of the balance in each case between local safety and the burdensome effects of compliance."

With the utmost patience Chief Judge Swygert has made a highly particularistic estimate, based on the long and detailed record in this case, of the balance between the local objectives and benefits of the Chicago ordinance and its effects on interstate commerce.

He began his analysis by noting (A. 6, 7) that the task involved several questions: 1) we must first decide whether the ordinance affects interstate commerce, for if there is no effect, there can be no burden and that ends the inquiry. If there is an effect, we must then ask 2) whether the legislature has acted within its province, and 3) are the means chosen adapted to the end.

The question whether benefit will result from the elimination of nuisance algae, he ruled (A. 9), is a policy question for the legislature. The courts should not attempt to evaluate the legislative decision as to the policy question.

On the other hand, whether the means chosen by the ordinance are adapted to its end is a proper subject for judicial inquiry. However, Judge Swygert ruled (A. 9, 10), in making such an evaluation, if the end is legitimate and the burden on interstate commerce is slight, the presumption of validity attaching to legislation dictates that the means chosen be presumed to be reasonably related to the end, unless the contrary is proven by clear and convincing evidence.

Petitioners (pp. 14, 15) attack this presumption as an unjustifiable creation of the court of appeals. But certainly the well established presumption of validity attaching to duly enacted legislation dictates a rebuttable presumption that the legislature exercised its discretion reasonably in determining what means are suitable to encompassing the end sought.

No support for petitioners' position is to be found in this Court's recent decision in *Allenberg Cotton Co., Inc.* v. *Pittman*, ... U.S. ....., 42 L.ed. 2d 195, 43 L.W. 4001 (1974), cited in the petition for certiorari (p. 12) and in the amicus brief of the Chemical Specialities Manufacturers Association (p. 6). That suit was brought in the Mississippi courts by a Tennessee cotton merchant against a Mississippi farmer, who refused to make delivery under a futures contract between them. The Mississippi Supreme Court held that the Tennessee plaintiff could not use the Mississippi courts to enforce the contract because it had not obtained a certificate to do business in Mississippi. This Court, in reversing, relied on the fact that the plaintiff had no office or warehouse in Mississippi and, finding that plaintiff's contacts with Mississippi lacked "localization," held that Mississippi's "refusal to honor and enforce contracts made for interstate or foreign commerce is repugnant to the Commerce Clause."

In contrast to the Allenberg Cotton Company, petitioner Procter and Gamble is distinctly "localized" in Illinois and in Chicago, where it operates a big modern plant requiring the services of many employees. Nor did the State police power, or that of its political subdivisions, enter in any way into the *Allenberg Cotton* case, as it does here.

National Bellas Hess, Inc. v. *Department of Revenue of the State of Illinois,* 386 U.S. 753 (1967), cited several times in the amicus curiae brief of the Soap and Detergent Association (pp. 9, 10, 11), also turned on the plaintiff's lack of "localization" in the state attempting to impose a use tax on it.

V.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THE BURDEN OF INTERSTATE COMMERCE, THAT RESULTS FROM THE ORDINANCE, IS SLIGHT.

IN FACT, PETITIONERS DID NOT PROVE THEY WERE DAMAGED.

According to the testimony of Procter and Gamble's general sales manager, William E. Forbes, Procter and Gamble prior to the effective date of the ordinance, "shipped about 96% of the requirements of the Chicago plant area from the Chicago plant, manufactured there" (A. 438). When the 8.7% limitation became effective in 1971, the company, he said, had to involve its plants in Kansas City, St. Louis, Dallas and Quincy, Illinois, to supply the Chicago plant area (A. 439, 445).

Commencing July 1, 1972, when the complete ban went into effect, Procter and Gamble withdrew its leading product, Tide, from the Chicago market and did not offer it with no-phosphate ingredients until November, 1972. In the interim, there was some increase in the sale of some

of the company's other brands with no-phosphate contents, but that increase, he said, was only a small fraction of the volume of the former phosphate product, Tide.

At the time of the trial, the company was shipping no-phosphate products to Chicago from its plants in Cincinnati, St. Louis, Kansas City and Alexandria, Louisiana. The so-called Chicago plant area of Procter and Gamble comprises northern Illinois, Wisconsin, Minnesota, part of Iowa, northern Indiana and western Michigan. In 1970 its sales in that area amounted to $58 million (A. 441, 442). (The Chicago plant area of Procter and Gamble is not to be confused with the Chicago wholesale grocery warehouse marketing area, which comprises northern Illinois, southern Wisconsin, southwestern Michigan and northern Indiana (A. 603, 615).)

On cross-examination, Forbes admitted (A. 560) that Procter and Gamble is constantly making such logistical changes by executive decision in order to adjust to day to day production and marketing emergencies and that these continual changes are a complex web. He also admitted that the existence of anti-phosphate detergent legislation in other states, particularly in Indiana and Michigan, would have compelled the company to make such adjustments even if the Chicago ordinance had not existed.

The warehousing situation in the Chicago area was testified to by Joseph O'Dea, Procter and Gamble's supervisor of sales in the Chicago area, in which there are 17 major warehouses. These are owned and operated by the principal chains and cooperatives. The number of stores served by each warehouse varies from 200 to 900 (A. 615). The 17 warehouses service about 2600 stores in the City of Chicago (A. 609, 658). Petitioners' map of the Chicago marketing area is reproduced at A. 183.

O'Dea contended that these warehouses, which customarily each carry 3500 to 4000 items (A. 608), each of these items being given an item number, do not have the capacity to "dual slot" both no-phosphate and phosphate formulation of the same brand of detergent. He asserted (A. 653) that if he asked a warehouseman to carry both phosphate and no-phosphate Tide, "he would throw me out."

A slot, O'Dea explained on cross-examination (A. 624, 625), is a particular area in a warehouse where a particular brand or brand size is located. The warehouses do not have shelves. A slot is a floor area on which a pallet or shallow platform rests. Items are stacked on those pallets. Each size of Tide occupies a different slot. But O'Dea did not explain why such a flexible arrangement could not readily be adjusted to accommodate two formulations of each brand by simply increasing the numbers on the pallets and reducing the size of the renumbered areas.

O'Dea reported that, as a result of the ordinance and the policy of the warehouses, none of the 17 Chicago area warehouses carried unlimited phosphate Tide, 15 carried only no-phosphate Tide and two, whose business was mostly suburban, carried only 8.7 percent Tide.

He estimated (A. 618) that the changes occasioned by the ordinance—and by the company's four month voluntary withholding of Tide from the Chicago market area—resulted in a loss of business for petitioner Procter and Gamble in the amount of $4,700,000 (A. 618, 691-5, 728).

But the plaintiffs objected to any inquiry into offsetting economies, such as the use of more productive plants, savings in labor costs, etc. No documentation was offered to substantiate the mere assertions. The district court sustained plaintiffs' objections and thus foreclosed any pos-

sibility of proving Procter and Gamble suffered actual damage.

Procter and Gamble's abstention from offering any heavy-duty laundry detergents in the Chicago market area for four months in 1970 was admittedly its own voluntary business decision. Its principal competitors, Lever Brothers and Colgate-Palmolive, did not make the same decision. They complied with the ordinance and sold no-phosphate heavy duty laundry detergents in Chicago and the Chicago warehouse area. Lever Brothers and Colgate-Palmolive did not become parties plaintiff in this lawsuit.

The witness for petitioner FMC, which manufactures and sells chemicals used by the detergent industry, was Frederick A. Gilbert, its vice-president in charge of administration for its chemical group (A. 806-814, 845-858). But he admitted FMC also manufactured substitutes for phosphates in detergents and that although the delivered price of phosphate is a little more than 8 cents a pound, whereas the substitute soda ash is 2 cents a pound, the margin of profit on the substitutes was greater than on the phosphates. FMC's counsel objected to any inquiry into actual profit and loss. The district court sustained the objection. In consequence, petitioner FMC Corporation also failed to prove damage.

In its Decision and Order, the district court dismissed the three other plaintiffs in this lawsuit—the Soap and Detergent Association, Monsanto Company and Amway Corporation—for failure to prove the jurisdictional amount of $10,000 required by 28 U.S.C. §1331. These dismissals have not been appealed.

Yet, the remaining plaintiffs, Procter and Gamble Company and FMC Corporation, no more *proved* the jurisdictional amount than did the plaintiffs dismissed.

VI.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE BURDEN ON INTERSTATE COMMERCE RESULTING FROM THE ORDINANCE IS SLIGHT.

In the section of its opinion (A. 10-A. 15) dealing with what, if any, burden is imposed on interstate commerce by the ordinance, the court of appeals considered four arguments of the petitioners.

They had argued that the ordinance impaired the normal operations of companies having interstate sales, in that the particular system of distribution used before the ordinance could no longer be used. The court noted (A. 10, 11) that this had not happened because the ordinance required it, but because the companies' operations were, pursuant to their own business choices, set up as they were. Indeed, if petitioners' facilities had all been located within the state of Illinois, they might still have had to make similar adjustments within the state, yet that would not have constituted a burden on intrastate commerce. Furthermore, as Procter and Gamble's general sales manager admitted, the company is continually making such logistical changes. The inconvenience was probably only temporary anyway. Sooner rather than later, the company would probably have adjusted its production and distribution to the most practical pattern. The court of appeals correctly found that "[w]hile this factor might necessitate a change in certain production facilities, it does not rise to the level of an unconstitutional burden on interstate commerce." (A. 11).

This result is in accord with the conclusion reached in *Colgate-Palmolive Co.* v. *Erie County,* 327 NYS 2d 488, at 491 (Sup. Ct. 1971), a similar case involving an attack

on the validity of another enactment regulating phosphorus in detergents, in which the court ruled:

> "The primary burden which is placed upon the petitioner Colgate involves nothing more than the changing of production facilities at the point of origin. There is no interference mandated by the County Law with transit across the state lines . . ."

This result is also in accord with the decision of the three judge district court that denied an injunction against enforcement of the Indiana ban on phosphorus in detergents in *Soap and Detergent Association* v. *Offutt*, 3 ERC 1117, at 1119 (SD, Ind., 1971), in which the court said:

> "[W]e think it certainly is true where you have a carrier who necessarily goes from state to state carrying the goods of third parties there is a higher interest in uniformity throughout the nation, but with respect to a commercial enterprise such as a manufacturer of detergents there is not the same national interest in uniformity throughout the country."

The argument of potential for conflicting legislation was rejected by the court, since no actual conflict had been proven.

It is to be noted that petitioners' complaints about "balkanization" of the detergent industry are exaggerated to the point of being fictitious. The enactments regulating phosphorus in detergents are not confusingly variegated. They call either for a total ban or an 8.7 percent limitation. The detergent industry has been living with such regulations for several years now.

The argument that the ordinance constituted "an embargo on a safe, useful and unique product" was rejected by the court (A. 12) on the ground there was no discrimination against outside manufacturers in favor of local manufac-

turers, who were also subject to the ordinance. It might have also been noted by the court that the self-serving decription of phosphate detergents as "safe" assumes as true what petitioners must prove—that is, that such detergents are not deleterious to the environment. At the City Council hearing, petitioner Procter and Gamble admitted that phosphate detergents are not environmentally harmless.

As to the argument based on the alleged extraterritorial effect of the ordinance in communities other than Chicago, the court concluded (A. 13-15) there was a burden, but it was slight. It expressed scepticism about the "double slot" testimony, and voiced the suspicion that Procter and Gamble might be more persuasive with the warehousemen if no lawsuit was pending. The court did consider the alleged fact that customers outside Chicago cannot obtain phosphate detergents where they are legal, a disruption and a burden. But the court found this only a slight burden, because there are other channels available for obtaining such detergents and some Chicago warehousemen were in fact stocking 8.7 percent phosphate detergents for the suburban trade while the ordinance was in effect.

These careful determinations by the court of appeals are sound and in accord with the evidence in the record. They do not require review by this Court, particularly in view of the further fact that, even though Procter and Gamble claims a largely self-inflicted loss of $4,700,000.00, that is greatly overbalanced by the saving to the taxpayers of Chicago of $20,000,000.00 a year because of reduced sewage treatment cost.

VII.

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT THE GOAL OF THE ORDINANCE AND THE MEANS SET BY IT FOR OBTAINING THAT END ARE CONSTITUTIONAL.

The court of appeals recognized (A. 15, 16) that the Chicago ordinance is part of an overall, national attack on water pollution. The Federal Water Pollution Control Act (33 USC §1370 (Supp. II, 1973)) not only permits, but encourages such local legislation. The aim of the ordinance is to eliminate nuisance algae and that is a proper objective for the City of Chicago, which has a right to be concerned about preventing damage from its effluent to its neighbors downstream on the Illinois River.

As to the aptness of the means chosen to achieve that end, the court ruled that it should accept the determination of the City Council to that effect unless it is disproven by clear and convincing evidence.

As to the condition of the Illinois Waterway with respect to nuisance algae, the court found that the evidence is conflicting (A. 17). The City produced photographs showing such growths, but there was testimony there were none. The court of appeals accepted it as a fact that there are some nuisance algae in the Illinois River and that there can be more. Even if phosphorus is not now the limiting factor there, the ordinance within a few months drastically reduced the phosphorus in the sewage effluent from Chicago going into the Illinois River. The Chicago ordinance is "a significant first step" toward the goal of reducing phosphorus in the waterway until it is a limiting factor and its absence then eliminates and prevents nuisance algae in the Illinois Waterway.

"There is no question," the court found (A. 19), "that both eutrophication and phosphorus are serious problems concerning Lake Michigan." Though the flow of sewage from Chicago into the lake during heavy rainfalls is minimal, "the phosphorus level is at such a precarious point that even this minimal amount takes on added importance." The court found that "Chicago has a legitimate interest in banning phosphate detergents as an example for other communities presently releasing their sewage into Lake Michigan" (A. 19).

"Based on all the evidence," the court of appeals concluded (A. 20), "the presumption afforded the City Council's judgment has not been overcome."

That just result should not be set aside.

VIII.

THE OPINION OF THE COURT OF APPEALS DOES NOT LIMIT THE PROTECTION OF THE COMMERCE CLAUSE TO METHODS OF INTERSTATE TRANSPORTATION, SUCH AS TRAINS AND TRUCKS.

THE DECISION BELOW DOES NOT THREATEN TO DESTROY THE NATIONAL MARKET.

The petitioners accuse the court of appeals of unjustifiably limiting the protection of the commerce clause "only to methods of interstate transportation" (Petition, pp. 10, 11).

What the court of appeals actually did was to note the discrepancy between the complaint of the petitioners and the precedents they relied on to buttress it. The gist of petitioner Procter and Gamble's claimed grievance is that, in order to meet the requirement of Chicago's ban on phosphates in detergents, it had to transport no-phosphate detergents from some of its other plants located in other states,

instead of supplying the Chicago wholesale marketing area from its Chicago plant, as it had done before. To support its contention that this was an unconstitutional burden on interstate commerce it cited cases involving attempted state regulation of interstate carriers, such as *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945) (state statute regulating train lengths), and *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959) (state statute regulating the size of mudguards on trucks).

The court of appeals pointed out (Petition, pp. A-10, 11) that the ordinance did not interfere with interstate commerce itself, but merely inconvenienced a manufacturer that had factories and distribution centers in numerous states.

The claim of petitioner FMC is merely that the ordinance reduced the demand for its phosphate products, resulting in a loss of sales. FMC failed to establish that it had a constitutional right to a guaranteed sale of its phosphates.

Since the logistical arrangements Procter and Gamble made in order to comply with the ordinance all occurred within the company's internal set-up, even though spread over several states, the court of appeals concluded that "the ordinance is not a burden on interstate commerce, but is merely a 'burden' on a company which happens to have interstate distribution facilities." (Petition, pp. A 10, 11).

Petitioners are knocking down an open door in asserting (Petition, p. 13) that the commerce clause applies not only to trains and trucks, but to cantaloupes, books, correspondence courses, oleomargarine, etc., etc., as well. Of course it does. But a state or local law is not a burden on interstate commerce unless it burdens interstate commerce. Compliance with regulations of intrastate commerce is often inconvenient also.

To burden is to place at a disadvantage. What the Founding Fathers intended by the commerce clause was to assure a national market. To effectuate this, they sought to and did prevent the creation of embargoes, the imposition of customs duties on interstate commerce, and discrimination against out-of-state enterprise. Hamilton's words in *The Federalist*, No. 11, cited by petitioners (p. 11), were made in a plea to the young nation not to place its reliance on foreign ship bottoms, but to create a strong navy and merchant marine of its own. It was not the intention of Hamilton to place interstate commerce in a privileged position by freeing it from health, safety and welfare regulations, including environmental regulations, to which intrastate commerce is also subject.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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REPLY BRIEF OF PETITIONER

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No. 74-1109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

THE PROCTER AND GAMBLE COMPANY and FMC CORPORATION, *Petitioners,*

v.

THE CITY OF CHICAGO, *Respondent.*

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THE CITY OF CHICAGO, *Respondent.*

REPLY BRIEF FOR PETITIONERS

Petitioners, The Procter and Gamble Company and FMC Corporation, hereby reply to the brief for the City of Chicago in opposition to the petition for a Writ of Certiorari to review the opinion and judgment of the United States Court of Appeals for the Seventh Circuit.

1. Respondent has misstated the issues presented by this case. Contrary to respondent's claim, petitioners do not urge federal preemption of state and local efforts to respond to environmental problems.[1]

[1] Respondent's reliance upon the Federal Water Pollution Prevention and Control Act, 33 U.S.C. § 1370, is misplaced. Although the Act does not preempt state and local legislation, neither does it exempt such legislation from the restrictions imposed by the Commerce Clause.

Concededly, state and local authorities may adopt legislation reasonably designed to respond to local problems, even if such legislation may tangentially affect the flow of interstate commerce. It is equally well-settled, however, that the Commerce Clause imposes important restraints upon the exercise of local police powers. In particular, this Court has unequivocally declared that local authorities may not regulate interstate commerce "so as substantially to affect its flow or deprive it of needed uniformity in its regulation. ..." *Southern Pacific* v. *Arizona*, 325 U.S. 761, 775 (1945). *See also Pike* v. *Bruce Church*, 397 U.S. 137 (1970). The question presented in this case is by what standards these competing principles should be reconciled so as to accommodate national and local interests.[2]

The opinion of the Court of Appeals in this case provides clear evidence that clarification of the appropriate constitutional standards is urgently needed. The court's opinion reflects confusion and uncertainty regarding the proper application of the Commerce Clause to state and local legislation. The court acknowledged that it had serious doubts as to the "precise test" that should be applied here. (Petition at A-6.) It stated that this case involves "a very difficult constitutional problem." (*Id.* at A-20.) In the absence of what it considered to be adequate guidance from this Court, the Court of Appeals was compelled to strike a "compromise" among the decisions of this Court. (*Id.* at A-9.)

[2] The problem here was wryly described by Thomas Reed Powell almost 20 years ago. He observed that the states may regulate interstate commerce, "but not too much." He added that "[h]ow much is too much is beyond the scope of this statement." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation* ix (1956). The question of "how much is too much" is, however, directly presented by this case.

Unfortunately, in groping for an appropriate compromise, the Court of Appeals disregarded well-settled principles regarding the proper interpretation of the Commerce Clause. The compromise includes novel requirements that will encourage the imposition of disparate and conflicting local restrictions upon the movement in interstate commerce of safe and beneficial products.[3] Review by this Court is required to clarify the constitutional principles that are applicable here, and to reestablish the strong protection that the Commerce Clause was intended to provide.

2. Contrary to respondent's claim, the Court of Appeals unjustifiably restricted the degree of protection afforded by the Commerce Clause to the free movement of manufactured goods. The Court of Appeals assumed that the full protection of the Clause extended only to the instrumentalities of commerce, and not to commerce itself. (Petition at A-11, 12.) Nothing in the decisions of this Court warrants the imposition of such a limitation. As shown in the petition, this Court has heretofore consistently applied the Clause to protect a wide variety of manufactured and agricultural products from state and local legislation. (*Id.* at 12-14.) Moreover, when the Court has considered state regulation of interstate transportation facilities, it has never suggested that such facilities enjoy a privileged or unique position under the Clause. The novel restriction announced by the Court of Appeals would balkanize the free national market for manufactured goods, and

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[3] As shown in the petition (at 8 n.4, 18 n.14), such conflicting requirements have already been created with respect to the distribution and sale of phosphate detergent products. In these circumstances, respondent's reliance upon Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440 (1960), is misplaced.

defeat the strong national policies embodied in the Commerce Clause.

3. Respondent wrongly claims that the result reached by the Court of Appeals may be justified by considerations of public health and safety. The factual findings made by the trial court demonstrate that no such considerations are involved here. (Petition at B-6, 9.) Moreover, even if it were thought that this case involved issues of health and safety, such considerations cannot exempt local legislation from the requirements of the Commerce Clause. Although the Court gave weight to health and safety matters in *Brotherhood of Locomotive F. & E.* v. *Chicago, R. I. & P.R. Co.*, 393 U.S. 129 (1968), it emphasized that the evidence there was "conflicting" and "inconclusive," *id.* at 136, and held merely that in such a situation it was inappropriate to disturb state legislation. *Id.* at 140. In addition, the Court held in *Southern Pacific Co.* v. *Arizona, supra,* that asserted considerations of safety did not justify a substantial interference with the free movement of interstate commerce. *See also Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959).[4]

Even where matters of health and safety are assertedly involved, application of the Commerce Clause requires the resolution of questions "of degree," concerning the extent of any burden on commerce, whether less burdensome methods are available to vindicate the local interest, and other similar matters. *Pike* v. *Bruce*

[4] Respondent suggests that in South Carolina Highway Dept. v. Branwell Bros., 303 U.S. 177 (1938), the Court "disallowed" the trial court's inquiry into the factual bases of local legislation. Insofar as *Branwell* may have been intended to create any such rule, it has now been overruled by *Bibb, Southern Pacific* and even *Brotherhood,* where such factual inquiries were conducted by the trial court and considered by this Court.

Church, supra at 142. In this instance, however, the Court of Appeals refused to apply the "predominant test" for the application of the Commerce Clause. (Petition at A-7.) It failed to examine questions "of degree," disregarded the findings of the trial court, and instead relied upon a novel presumption of its own creation.

4. Much of respondent's memorandum in opposition consists of a reiteration of factual allegations previously made to the trial court. There is no need to respond in detail to those allegations. They need not be resolved by this Court. They were fully considered by the trial court and, in light of the elaborate evidence presented by petitioners, were either rejected or found not to support the ordinance. The facts relevant to this case are carefully set forth in the opinion of the trial court. Respondent's efforts to circumvent those findings provide no justification for denial of review of the important constitutional issues involved here.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIORARI DENIED